No. 75-584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.

BRIEF OF RESPONDENT ELIZABETHTOWN GAS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Elizabethtown Gas Company (Elizabethtown), one of the petitioners in the Court below and a respondent here, urges this Court to deny the petition for writ of certiorari or, alternatively, to grant it in summary fashion and effect an immediate remand to enable the court of appeals to decide expeditiously the issues Elizabethtown raised before that court in its petition for review.

STATEMENT

Transcontinental Gas Pipe Line Corporation (Transco) owns and operates an interstate natural gas pipeline system extending from Texas to New York City from which it serves one firm direct industrial customer and 80 firm wholesale (sale for resale) customers which in turn supply residential, commercial and industrial consumers. The Federal Power Commission (FPC) regulates the transportation and sale of gas by Transco. Local authorities regulate the operations of Transco's wholesale customers.

Elizabethtown is a public utility distributing natural gas in 68 communities serving over 183,000 consumers under regulation by the New Jersey Board of Public Utility Commissioners. Elizabethtown has been in the gas distribution business for 125 years. Prior to the initiation of natural gas service by Transco in 1951, Elizabethtown manufactured the gas that it sold to consumers. Transco is Elizabethtown's principal natural gas supplier today.

Due to insufficient gas supplies, Transco has been curtailing firm gas service on its system for over three years. The shortages are continuous, year round and worsening.[1] Curtailments have been governed by interim curtailment plans filed by Transco with the FPC.

On September 30, 1974, Transco filed a proposed interim plan (ISA) for the period November 1974 to November 1975. The ISA was the product of settle-

[1] Transco curtailed 7.41% in 1972-73; 15.56% in 1973-74 and expected to curtail 25.77% in the winter of 1974-75, 35.45% in the summer of 1975, 43.22% in the winter of 1975-76 and 53.13% in the summer of 1976. Transco has studied its gas supply situation as far in the future as 1981, and reports that no relief from curtailments is in sight.

ment negotiations extending over a period of several months. It contained a compensation feature, similar to features found in each of the prior interim plans approved by the FPC,[2] which was designed to balance the equities and share the economic burdens of unequal curtailments. (App. E, pp. 41A-42A) [3]

Because the compensation feature had enjoyed such prior FPC approval, its inclusion in the ISA was not briefed by the parties when the plan was presented to the FPC for approval. Nonetheless, by order issued November 12, 1974, the Commission rejected the ISA on the ground that the compensation feature which was an unseverable feature of the plan was unlawful. The FPC found that only a curtailment plan containing its 467-B order of priorities could adequately protect consumers during the 1974-1975 winter season. (App. E, p. 35A)

Concluding that the course recommended by the FPC would not meet consumer needs, the court of appeals on November 26, 1974 ordered that the ISA be placed in effect pending further order of the court. The compensation payments under the ISA were to be placed in escrow. The court's judgment as to the proper curtailment plan was borne out by subsequent experience.

After briefs had been filed and oral argument heard, the court of appeals asked Transco and the FPC for data relating to Transco's gas supplies. (App. C) The responses were not identical and the FPC (which has always had supervisory authority over the gas re-

[2] See *Transcontinental Gas Pipe Line Corporation*, 46 F.P.C. 1212, 1213 (1971); 48 F.P.C. 1060, 1061 (1972).

[3] Reference is to the Appendix of the Petition for Writ of Certiorari.

serves dedicated to the service Transco is authorized to render) refused to stand behind the data it provided to the court. Whereupon, after notice to the parties, the court ordered the FPC to conduct an investigation sufficient to enable the Commission to verify the gas reserve data submitted to the court. (Appendix A) It is this order which is challenged in this Court.

REASONS FOR DENYING THE WRIT OR, ALTERNATIVELY, FOR SUMMARY ACTION BY THIS COURT

1. Gas supplies are the life blood of the interstate gas pipeline companies. Transco was authorized by the FPC to render firm service to its wholesale customers on the basis of findings that Transco's gas reserves were adequate.

For many years, the FPC kept abreast of the gas supply conditions on the pipeline systems which it regulates by requiring the filing of annual reports on Form 15.[4] It was the Commission's intention that these reports be relied upon by the pipelines in applying for certificates of public convenience and necessity in order to render new or additional service.[5] As a consequence, the public relied on these reports as well as the expectation that the Commission would so exercise its continuing oversight functions as to assure that the reported gas supply data could be relied upon.

The FPC itself brought into question the reliability of the Form 15 data when responding to the inquiry of the court of appeals. The FPC indicated that it was studying the problem in a pending proceeding but

[4] 18 C.F.R. § 260.7.

[5] 18 C.F.R. § 157.14(a)(10); 29 F.R. 4874, April 7, 1964, amended 32 F.R. 3292, 35 F.R. 6962, 36 F.R. 6810.

offered no quick response. (App. A, p. 5A) When the court sought to compel the FPC to verify the data, the FPC sought the assistance of this Court on the technical grounds that it is up to the FPC to decide how to perform its duties. Surely consumer protection warrants a more flexible and immediate response to the court's inquiry. It would appear that a ministerial rather than a discretionary function was involved.

The FPC struck down the compensation feature of the ISA, acting on its expertise in the law and the facts of the Transco system. When its knowledge of the underlying facts regarding gas reserves was brought into question, the Commission sought remand despite the attendant delays for the adversely affected customers seeking relief from the court of appeals.

Curtailments on Transco's system are so deep and continuing[6] that they amount to an abandonment of service.[7] The Court is not faced here with the "temporary and chronic" gas shortage which was present in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 626 (1972).

We do not believe that a study of Transco's reserves will do much to ameliorate the situation, and we have so indicated to the court of appeals. But that does not mean that the state of Transco's gas supplies is not

[6] See n. 1, *supra*.

[7] This condition of actual termination of a part of the authorized gas service has probably reached the point where it amounts to abandonment within the meaning of Section 7(b) of the Natural Gas Act. 15 U.S.C. 717f(b). *Cf. FPC Louisiana Power & Light Co.*, 406 U.S. 621, 645-646 (1972).

relevant to the outcome of the appeals in the court below.

Transco's curtailments are forcing a restructuring of the gas distribution industry which had grown dependent upon it over the 24 years of its active existence. Wholesale customers are being compelled to reassume an historical obligation of producing their own gas supplies. They are being forced to find ways to serve local gas consumers with expensive supplemental gas supplies as their pipeline supplier withdraws from the role of firm supplier. The compensation feature of the ISA is understandable only in the context of this development.

Each wholesale customer served by Transco built a gas distribution system designed to deliver to consumers the volume of firm service Transco was authorized by the FPC to transport and deliver to them. As Transco's supply dwindled, local consumers have been compelled to bear the cost of the idled local pipeline capacity, until supplemental gas supplies become available.

The interim curtailment plans on Transco's system during the past several years have reflected an emergency aspect, in that they respect the fact that some wholesale customers had not yet been able to find necessary supplemental gas supplies, as a result of which there was a danger that some gas consumers which cannot get along without natural gas would have to be shut off. In these circumstances, the interim plans have provided some distributors with more than a proportionate share of the shrinking supply of natural gas from Transco. As a consequence, other wholesale customers (and their consumers) have received less of the

inexpensive natural gas. A preference and discrimination was created. What prevented it from being undue under Section 4(b) of the Natural Gas Act [8] in the case of the ISA and the predecessor plans [9] is the compensation feature.

It cannot be a matter of complete indifference how deep the shortages have become on Transco's system and how severe or disproportionate are the resultant curtailments.

2. If this Court decides that the Petition for Writ of Certiorari should be granted, then we urge summary action so that the court of appeals may speedily decide the issues raised by the petitions for review which are still unresolved.

In a decision issued on November 14, 1975 in *Mississippi Public Service Commission* v. *FPC*, the Fifth Circuit held that "the imposition of payments as a condition for the receipt of higher priority gas is within the statutory power of the FPC over the movement of such gas in interstate commerce." [10] In reaching that decision, the court of appeals rejected arguments used by the FPC to justify its holding that the compensation provision in the Transco ISA was unlawful.[11] Adoption of the same rationale by the court below would support a similar reversal of the Commission's order which caused Elizabethtown and others to petition for review.

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[8] 15 U.S.C. 717c(b).

[9] See n. 2, *supra*.

[10] — F.2d — (5th Cir. Nos. 75-1635, *et al.* decided November 14, 1975, slip op. p. 452). A copy of the decision is attached hereto as Appendix BB.

[11] Compare Appendix BB, p. 451 with Appendix E, pp. 28A-29A.

The vacuum caused by the appeal to this Court, with its attendant delays, forced Elizabethtown to participate this past summer and early fall in the negotiations relating to an interim curtailment plan for the Transco system for the November 1975-November 1976 period without being able to achieve a compensation feature. That plan is now pending before the FPC for its approval. The lack of a compensation feature deprives that plan of a very salutary remedy.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. Alternatively, the petition should be granted and the matter returned to the court of appeals by summary order which will enable that court to decide speedily the issues which have been briefed and argued but remain undecided.

Respectfully submitted,

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Washington, D. C.
November 1975

APPENDIX AA

Extracts From the Natural Gas Act (15 U.S.C. 717, et seq.)

Section 4. (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. (15 U.S.C. § 717c(b))

* * *

Section 7. (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarraned, or that the present or future public convenience or necessity permit such abandonment. (15 U.S.C. § 717f(b))

Extracts From Federal Power Commission Regulations Under the Natural Gas Act (18 C.F.R.)

Part 157 — Applications for certificates of public convenience and necessity and for orders permitting and approving abandonment under Section 7 of the Natural Gas Act.

* * * *

§ 157.14 Exhibits

(a) *To be attached to each application.* All exhibits specified shall accompany each application when tendered for filing. . . .

* * *

(10) Exhibit H—Total gas supply data. A statement of total gas supply committed to, controlled by, or possessed by applicant which is available to it for the acts and services proposed, together with:

(i) The estimated remaining recoverable salable gas reserves available to applicant submitted in the form and containing all the data and information required by FPC Form No. 15, Annual Report of Gas Supply. (See § 206.7 of this chapter.)

(ii) Deliverability studies showing the volumes of natural gas which can and are proposed to be obtained each year submitted in the form and containing the data and information as required by FPC Form No. 15, Annual Report of Gas Supply.

(iii) The names and addresses of persons with whom applicant has gas-purchase contracts and the estimated volumes of gas reserves applicant has available under each contract, segregated by gas fields and reservoirs thereof with names and locations of fields (State, county or parish).

(iv) The maps required by FPC Form No. 15, Annual Report of Gas Supply.

(v) A conformed copy of each gas-purchase contract upon which applicant prposes to rely. Only three of the total number of copies of Exhibit H filed need include a copy of such contract. Contracts already on file with the Commission may be incorporated by reference without supplying additional copies, provided such contracts are identified with particularity by stating the exact pages of the contracts to be incorporated by reference and the file or docket number designation to which reference is made. The Commission or the presiding officer may direct that additional copies of such contracts be furnished to the Commission or to other parties to the proceeding. Any contract executed on and after April 2, 1962, and filed in support of an applicant's gas supply showing will be given

no consideration in determining adequacy of gas supply if it contains any price-changing provisions other than those defined as permissible in § 154.93 of this chapter.

(vi) Pipeline companies which have filed annual reports in conformity with § 260.7 of this chapter will be required to file additional information with regard to gas supply and deliverability in support of applications for certificates for authorization to increase existing sales, facilities or capacity; to construct new facilities to make new sales; to alter any type of gas service; and to attach new sources of supply except budget-type applications filed under paragraph (b) of § 157.7 of this chapter. In all other applications the pipeline company may rely on the information set forth in said annual report, by reference thereto, unless otherwise ordered by the Commission when gas supply and deliverability information is required to be in the application and is not permitted to be incorporated by reference, such information need pertain only to the supply and deliverability for that phase of the company operations which would be affected by the facility or sale for which authorization is sought. In those instances, the pipeline company may file only those portions of the annual report for which changes have been made or which are supplemental to the annual report then currently on file with the Commission. Total system supply and deliverability information shall be included in all applications for authorization to serve major new markets or to serve major existing markets from new sources of gas supply over new routes. The receipt, maintenance. and consideration of any information received by the Commission staff for review under this section is subject to the requirements of paragraph (f) of § 1.36 and§ 2.72 of this chapter and the laws of the United States.

(vii) . . .

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§ 260.7. Form No. 15, Annual report of gas supply for certain natural gas pipelines.

(a) A revised form of Annual Report of total Gas Supply, designated FPC Form No. 15, is prescribed for the reporting year 1972 and thereafter to be used by natural gas companies as provided by and in accordance with paragraphs (b) and (c) of this section.

(b) Each natural gas company, as defined by the Natural Gas Act, as amended (52 Stat. 821), subject to the requirements of § 260.7 (18 CFR 260.7) except (1) a company whose gas reserves, owned or controlled by producer contracts, at the end of any report year are less than 50 billion cubic feet of gas, or (2) a company purchasing its entire supply of natural gas from other companies subject to the provisions of this section and/or foreign suppliers, or (3) a company which acts only as a transporter of gas for others, shall prepare and file with the Commission for the calendar year ending December 31, 1972, on or before December 31, 1973, and for years subsequent to 1972, on or before each April 1, thereafter, for each calendar year ending December 31, of the previous year all data as prescribed by Paragraph No. 1 of the General Instructions as set out on page 0001 of the Appendix A attached hereto.[1] Such companies having the exceptions hereinbefore stated shall file the schedules required by Paragraph No. 2 of such General Instructions.

(c) Also, in addition to the requirements of paragraph (b)(1) of this section for the reporting year 1972 only, each reporting natural gas company shall file on or before July 1, 1973, either (1) an abbreviated reserves report consisting of the newly revised FPC Form 15 (Appendix A)[1] "Synopsis of pipeline Company Gas Supply" (page

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NOTE: Form 15, added by Order 279, 29 F.R. 4874, Apr. 7, 1964, was amended by Order 337, 32 F.R. 3292, Feb. 25, 1967; Order 399, 35 F.R. 6962, May 1, 1970; Order 476, 38 F.R. 6810, Mar. 13, 1973.

0047) and lines 101 and 102 of Schedule No. 1 of Appendix A entitled "System Deliverability Summary," or (2) in lieu thereof, at the companies' option, shall file the 1972 data in the same Form 15 format as was used to report the 1971 data.

[Order 476, 38 F.R. 6810, Mar. 13, 1973]

APPENDIX BB

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

Nos. 75-1635, 75-1712.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

MISSISSIPPI POWER & LIGHT COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Nov. 14, 1975.

Petition for Review of an Order of the Federal Power Commission.

Before BELL, CLARK and RONEY, Circuit Judges.

BELL, Circuit Judge:

Mississippi Public Service Commission (MPSC) and Mississippi Power and Light (MP & L) seek review of an order of the Federal Power Commission denying MPSC's petition for extraordinary relief from a curtailment plan approved by the Commission for United Gas Pipeline Co. (United).[1] The extraordinary relief was to be in the form

[1] The currently effective curtailment plan for United was originally filed by United in 1971 and subsequently accepted, as modified, by the Commission in Opinion No. 606, 46 F.P.C. 786 (1971). The Commission subsequently rejected the curtailment plan of Opinion No. 606 with its Opinion No. 647, 49 F.P.C. 179 (1973) and Opinion No. 647-A, 49 F.P.C. 1211 (1973) which were reviewed by this court in *Louisiana* v. *FPC,* 5 Cir. 1974, 503 F.2d 844. This court found that the Commission had failed to comply with Section 5 of the Natural Gas Act in not finding the currently

of payments from higher to lower priority customers of United to compensate the latter for the greater costs of alternative fuels they were forced to use as a consequence of curtailment. The Commission denied relief on the ground that it lacked jurisdiction to order or approve any plan of compensation. We disagree and therefore set aside the order and remand the case to the Commission for further proceedings.

I

This case arises from the interaction of the increasing shortage of natural gas with the inflationary effects of the general energy crisis. Natural gas, traditionally a cheap, clean and efficient energy source, has become even more attractive as a fuel bargain in the context of today's soaring energy costs. The regulated price of natural gas in the interstate market has become disproportionately low relative to the per energy-unit costs of alternative fuels. One consequence of the increasing inability of natural gas producers to meet the demands of their customers has been the need to curtail deliveries to those customers on the basis of some equitable plan as approved by the Federal Power Commission. Where deliveries have been curtailed, natural gas users have been forced to use alternative, more expensive fuels.

The Supreme Court has held[2] that the Commission has the authority to approve curtailment plans of natural gas producers on the basis of the Commission's jurisdiction, under Section 1(b) of the Natural Gas Act, over the trans-

effective curtailment plan to be unjust and unreasonable and remanded the case to the Commission for further findings in that regard. The Commission's order on remand from this court, entered on September 6, 1974, is now pending before another panel of this court. *Louisiana Power & Light Co., et al.* v. *FPC,* Nos. 75-2183, 75-2339, 75-2347, 75-3057 (argued October 17, 1975).

[2] *FPC* v. *Louisiana Power & Light Co.,* 1972, 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369.

portation of natural gas in interstate commerce.[3] The authority is subject to the statutory standard of Section 4(b) of the Act.[4] Numerous cases have arisen in the courts challenging various aspects of those plans, which allocate available natural gas on the basis of priorities determined primarily by the end use that particular customers make of the natural gas.[5] Under the usual plan, provision is made for seeking extraordinary relief where justified by exigent circumstances. The order here under review concerns such a petition.

II

MPSC filed its petition for extraordinary relief on August 5, 1974, on behalf of the consumers served by three Mississippi electrical utilities subject to its regulation, MP & L, Mississippi Power Company (MPC), and South Mis-

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[3] Section 1(b), Natural Gas Act, 15 U.S.C.A. § 717(b) provides:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

[4] Section 4(b), Natural Gas Act, 15 U.S.C.A. § 717c(b) provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

[5] *See e.g., Consolidated Edison Co of New York Inc.* v. *FPC*, D.C.Cir. 1975, 512 F.2d 1332; *Louisiana Power & Light* v. *FPC*, *supra; Atlanta Gas Light Co.* v. *FPC*, 5 Cir., 1973, 476 F.2d 142.

sissippi Electric Power Association (SMEPA).[6] These utilities, by virtue of their "inferior" use of natural gas for boiler fuel,[7] had been given the lowest priority in United's curtailment plan, and had therefore been forced to use alternate fuels at four and five times the price of natural gas. The cost of these alternate fuels had been passed directly to their customers by the use of fuel adjustment clauses authorized by MPSC. All three utilities had firm contracts with United to supply varying amounts of natural gas, but the effect of the curtailment plan was to deny them their contractual entitlements in varying degrees.

The rationale of the relief sought by MPSC for the utilities was that the practical and economic burdens of curtailment should not fall solely on these lower priority users, but that, in order for the curtailment plan to be just, reasonable and equitable, the higher priority users should also bear some of the economic burden of curtailment. A number of parties intervened in the petition for relief, including the three Mississippi electric puble utilities, Mississippi River Transmission (MRT) (a distributor of natural gas), and United, as the pipeline affected by any proposed plan of compensation. There were various other intervenors who are not now before the court. On October 17, 1974, the Commission granted the several interventions, but denied the relief requested by MPSC, stating:

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[6] Aside from the request for institution of a compensation plan, MPSC also requested that the electric utilities under its regulation be exempted from the curtailment of gas deliveries under the interim plan. The Commission denied this request also, but no party has chosen to appeal that denial. We therefore do not consider the issue.

[7] The use of natural gas for boiler fuel is deemed "inferior" because it is the least efficient use of such fuel and because customers who make such use of natural gas can presumably most easily convert to alternative fuels.

> Assuming MPSC's allegations of fact to be correct, we conclude that the petition should be summarily dismissed for lack of jurisdiction to grant the requested relief.

The Commission supported its decision by stating that a system of compensation payments would have several unlawful effects: first, jurisdictional resale rates under such a system, i.e., by United, would not be related to the pipeline's cost of service plus a reasonable rate of return, and would therefore be in violation of the statutory standard of just and reasonable. Second, the Commission has no jurisdiction over the rates of direct sale customers, who in most instances would give or receive such compensation payments. Finally, the Commission construed the petition as being "nothing more than an attempt to obtain damages because of United's inability to deliver its full contractual commitment," a matter to be resolved only by an appropriate court.

MPSC, MP & L and MPC petitioned for rehearing, arguing that the Commission had misconstrued the request for relief. On December 4, 1974, the Commission granted the petition for purposes of further consideration, but finally denied the petition for rehearing and terminated the proceeding on February 13, 1975. The Commission noted that it had taken similar action in another but unrelated proceeding, and incorporated the reasoning in the orders in the other proceeding by reference.[8]

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[8] *Transcontinental Gas Pipe Line Co.*, FPC Docket No. RP72-99, Order Finding An Emergency On Transco's System and Denying Motion for Interim Settlement As to Curtailment Rules, November 12, 1974, and Order Granting Rehearing in Part, Denying Rehearing In Part, and Requiring Environmental Impact Statement, January 10, 1975, *pending review sub nom. Transcontinental Gas Pipe Line Corp., ca al.* v. *F. P. C.*, D.C.Cir., Nos. 74-2036, et al. (argued May 21, 1974).

Although eschewing jurisdiction, the Commission goes further in that proceeding and seems to decide the petition for relief on the merits. We do not reach the merits, preferring to allow the Commission to reconsider the matter in light of our holding that jurisdiction exists. Moreover, any consideration on the merits in this court must be on the basis of findings made by the Commission on an adequate record.

III

MPSC and MP & L seek review of that final order in two appeals, No. 75-1635 and No. 75-1712, which are consolidated for review by this court. There are three intervenors: MPC sides with MPSC and MP & L in arguing that the Commission erred in finding no jurisdiction. MRT, as a high priority user who might have to make compensation payments, supports the Commission and asserts that, in effect, the lower priority customers are asking MRT to pay damages based on United's breach of contract. Finally, United supports jurisdiction in the Commission and the concept of compensation if submitted in and considered as a part of the present remanded curtailment proceeding or as a part of an industry-wide rule making proceeding.

MPSC and those who favor compensation argue that the Commission has jurisdiction, and the power under its jurisdiction to approve equitable curtailment plans, to impose a system of compensation payments to make such plans equitable as "pragmatic adjustments . . . called for by [the] particular circumstances." *FPC* v. *Louisiana Power & Light Co.*, 1972, 406 U.S. 621, 642, 92 S.Ct. 1827, 1839, 32 L.Ed.2d 369, 386, *quoting FPC* v. *Natural Gas Pipeline*, 1942, 315 U.S. 575, 586, 62 S.Ct. 736, 86 L.Ed. 1037, 1050. The Commission, on the other hand, asserts that it has no jurisdiction to order compensation payments and moreover, if it did, such payments would be either impractical or not in the public interest.

The question presented is one of law: Did the Commission have jurisdiction to effectuate relief of the type sought in the petition for extraordinary relief. *See Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U.S. 672, 74 S.Ct. 794,

98 L.Ed. 1035, for a similar review of a denial of jurisdiction by the Commission. Our review of the Commission's decision is guided by the principle that, while we may not order the Commission to exercise its discretion in a particular way, we may order the Commission to consider a matter that is within the jurisdiction if such be the case. *Cf. Addison* v. *Holly Hill Fruit Products,* 1944, 322 U.S. 607, 622, 64 S.Ct. 1215, 88 L.Ed. 1488, 1499.

We consider whether the Commission was correct in light of the language of the Supreme Court in *FPC* v. *Louisiana Power & Light, supra;*

> Since curtailment programs fall within the FPC's responsibilities under the head of its "transportation" jurisdiction, the Commission must possess broad powers to device effective means to meet these responsibilities. FPC and other agencies created to protect the public interest must be free, "within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances." *FPC* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 586, 62 S.Ct. 736, 743, 86 L.Ed. 1037, 1050 (1942). Section 16 of the Act assures the FPC the necessary degree of flexibility in providing that:
>
> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. . . ." 15 U.S.C. § 717*o*.
>
> In applying this section, we have held that "the width of administrative authority must be measured in part by the purposes for which it was conferred. . . . Surely the Commission's broad responsibilites therefore demand a generous construction of its statutory authority." (citations omitted)

406 U.S. at 642, 92 S.Ct. at 1839, 32 L.Ed.2d at 386.

It seems plain from this that the Commission is vested with both jurisdiction and broad powers to solve the problems caused by curtailment.

The Commission argues to this court that it does not have the jurisdiction to order compensation, but approaches this position in reverse. The asserted lack of jurisdiction is not because there is no statutory basis for compensation, but rather because there are effects of compensation as well as provisos within the Natural Gas Act that cumulatively preclude the implementation of compensation.

In its brief here, the Commission poses three ostensible barriers to compensation payments. They are somewhat like the reasoning given in its order denying relief. First, it asserts that compensation payments would result in discriminatory rates in violation of the statutory standard of Section 4(b) of the Natural Gas Act. 15 U.S.C.A. § 717c (b). Second, it asserts that compensation payments would in effect be sales for resale of gas in interstate commerce requiring both certification and filing of tariff schedules. Finally, the Commission urges that the Natural Gas Act specifically excepts from the Commission's jurisdiction rate-making authority over direct sales of gas. 15 U.S.C.A. § 717(b).

The essential problem is that the Commission defines "rates" too broadly. By characterizing the compensation payment as either a rate in itself or a change in the rates of the natural gas company, the Commission necessarily sets up a jurisdictional barrier to compnesation. It seems to us, however, that compensation payments are not "rates" but in the nature of surcharges imposed in the context of a curtailment plan to insure that the burdens of curtailment are spread evenly and equitably among those affected by such plans. Thus, the basis for the imposition of such charges is not the rate setting jurisdiction of the Commission but rather is the transportation jurisdiction of the Commission. Moreover, compensation payments are

more analogous to the penalty payments included by the Commission in various curtailment plans to deal with the problem of overtakes.[9]

The contention that compensation payments are sales for resale requiring certification and tariff filings is also without substance. Because we do not view compensation payments as rates but rather as being in the nature of surcharges or penalties, we do not find such payments to be sales in any realistic sense of the word.

Our characterization of compensation payments also answers the argument of the FPC that a system of compensation would require it to exercise rate-making authority over direct sale customers. In addition, contrary to the Commission's view, the provision of the Act, Section 1(b), which denies the Commission jurisdiction over direct sales is not a limitation on the transportation jurisdiction of the Commission but rather should be seen in the context of the original regulatory scheme envisioned by Congress of complementary federal and state regulation. See e. g., *FPC* v. *Transatlantic Gas Pipe Line Corp.*, 1961, 365 U.S. 1, 81 S.Ct. 435, 5 L.Ed.2d 377; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 1947, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128; *Interstate Natural Gas Co.* v. *FPC*, 1947, 331 U.S. 682, 67 S.Ct. 1482, 91 L.Ed. 1742. The purpose of the proviso regarding direct sales was to allocate the regulatory powers of the Commission and the various state agencies concerned with regulating the sale of natural gas within each state. The proviso does not preclude jurisdiction over the question of compensation as here presented.

In sum, we conclude that the imposition of compensation payments as a condition for the receipt of higher

[9] *See e.g.*, Panhandle Eastern Pipeline Company Tariff Schedules § 16.5, approved in 46 F.P.C. 1142, 1145 (1971); 47 F.P.C. 1567, 1959 (1972).

priority gas is within the statutory power of the FPC over the movement of such gas in interstate commerce.

Having considered the breadth of the Commission's jurisdiction, the question remains what action by this court is proper. In essence, what the Commission has done is to fail to exercise its jurisdiction by refusing to consider, with an appropriate record, a proposed remedy for an asserted wrong. *Cf. NLRB* v. *Food Store Employees*, 1974, 417 U.S. 1, 9-10, 94 S.Ct. 2074, 40 L.Ed.2d 612, 618. We, of course, intimate no view one way or the other as to whether compensation should be included. This court can, however, compel the Commission to exercise its jurisdiction by considering whether compensation is necessary to insure the justness and reasonableness under Section 4(b) of a particular curtailment plan. *Cf. Addison* v. *Holly Hill Fruit Products, supra.* Whatever the result on remand, the Commission should make findings supported by an adequate record, relating to the inclusion or the failure to include compensation as a part of a curtailment plan. *Cf. Universal Camera Corp.* v. *NLRB*, 1951, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456.

The relief sought by petitioners would require a modification of the curtailment plan now filed with the Commission. Our decision is without prejudice to the Commission considering their petitions and related pleadings, whether by way of consolidation, intervention or otherwise, as a part of the proceedings on the curtailment plan.

Set aside and remanded.